84-191

CASE NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ROBERT E. SCHWALBE,

PLAINTIFF-RESPONDENT

VS.

SYDNEY M. EISENBERG,

DEFENDANT-APPELLANT

ON PETITION FOR WRIT OF
CERTIORARI

FROM THE SUPREME COURT OF WISCONSIN

BRIEF FOR PETITIONER

SYDNEY M. EISENBERG
DEFENDANT-APPELLANT
1131 WEST STATE STREET
MILWAUKEE, WI 53233
414/271-0931

SYDNEY M. EISENBERG
ATTORNEY FOR
DEFENDANT-APPELLANT
1131 WEST STATE STREET
MILWAUKEE, WI 53233
414/271-0931

QUESTIONS PRESENTED FOR REVIEW

. Should a motion for new trial be granted when laintiff had been granted a judgment of $1.000.00 ompensatory damages and 5,000.00 for punitive da- ages, and records discovered subsequent to the rial proved that he had been pursuing a course of riminal acts toward property of others prior to he instant lawsuit?

. Can a Trial Court refuse on motion to permit n individual to be checked further for criminal ffenses when there is already evidence of several riminal damages to property?

Is a motion for new trial past the statute of mitations when it is brought within one year of appeal decision on the basis of fraud or perjury?

Was the serious error by the Trial Court in iling to instruct the jury on Petitioner's statu- ry rights plain error because of the resulting nial of fundamental fairness in the trial?

LISTING OF ALL PARTIES

All parties to this proceeding are: Sydney M. Eisenberg, Defendent-Appellant; Robert E. Schwalbe, Plaintiff-Respondent; James A. Gramling, Jr., and William G. Ladewig, attorneys for Plaintiff-Respondent.

SUBJECT INDEX A

SUBJECT INDEX B

ARGUMENTS:

TABLE OF AUTHORITIES PAGE

CASES

WISCONSIN STATUTES CITED

OTHER AUTHORITIES CITED

OPINIONS BELOW

The January 13, 1982 opinion of the Wisconsin Court of Appeals is unreported and contained on page 42.

The August 30, 1982 opinion of the Milwaukee County Circuit Court is unreported and contained on page 50.

The October 25, 1983 Wisconsin Court of Appeals opinion is unreported and contained on page 62.

JURISDICTIONAL STATEMENT AND STATEMENT OF FACTS

This is a Petition for review in relation to a civil proceeding which was commenced by Respondent against Petitioner arising from Respondents alleged illegal eviction by Petitioner. On March 19, 1981 the Honorable Patrick T. Sheedy, entered judgment in favor of Respondent. On January 13, 1982, the Wisconsin Court of Appeals Dist. I, affirmed Judge Sheedy's ruling. Motion for new trial was brought and heard before Milwaukee County Circuit Court Judge Sheedy and this motion was denied on August 30, 1982. Notice of Appeal was filed on December 2, 1982 and amended notice was filed December 7, 1982 in Judge Sheedy's court. The Wisconsin Court of Appeals affirmed the Circuit Court's decision on denying the motion for new trial on October 25, 1983. The Wisconsin Supreme Court on February 7, 1984, denied the petition for review. Justice Stevens of the United States Supreme Court signed an order on April 18, 1984 extending the time within which to file a Petition for a Writ of Certiorari in the case at bar to and including July 6, 1984. This Petition for review follows.

Jurisdiction is conferred upon this court pursuant to 28 U.S.C. § 1257(3) since Petitioner has timely raised substantial federal questions throughout the state proceedings. Specifically, Petitioner has alleged violation of his constitutional right to due process and a fair trial guaranteed by the Fourteenth Amendment. U.S. Constitution Amendment XIV, § 1.

Further, this court has jurisdiction to review plain error unchallenged in the state court when necessary to prevent fundamental unfairness. Wood v. Georgia, 450 U.S. 261, n. 5 (1980).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The text of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in Appencices: U.S. CONST. amend. XIV.

A CONCISE STATEMENT OF THE CASE

On the 19th day of March, 1981, Milwaukee County Circuit Court Judge Patrick T. Sheedy decreed that a judgment be entered in favor of the Plaintiff-Respondent and against the Defendant-Appellant, in the sum of $5,758.00, plus $470.84 in costs. The decision of Judge Sheedy was appealed to the Wisconsin Court of Appeals, which filed its decision January 13, 1982.

Plaintiff Robert E. Schwalbe rented a room in the Sydney Hotel, 770 North Marshall Street, Milwaukee, Wisconsin, in April of 1979. The building was licensed as a hotel by the City of Milwaukee and the State of Wisconsin, and was operated by the hotel staff of Defendant-Appellant Sydney M. Eisenberg.

Mr. Schwalbe first selected room 205 as his residence, which he severely damaged, and moved to a different room while the premises were being repaired. He then moved to room 201. In December of 1979 Mr. Schwalbe moved to room 603.

In April of 1980 Plaintiff Schwalbe was in arrears on his rent. He found he was unable to get into his room. He passed two "bad" checks. The rent was on a monthly basis. Plaintiff testified that upon returning to his room at approximately 9:00 o'clock in the evening he found something that he described as a brass pin sticking out of the key slot of his room. Since he could not get his key in to open the door, he walked to his truck and procurred a vise grip. Upon returning to his room, one of the managers, Robert Daemmrich, was waiting there. Upon asking Mr. Daemmrich who put the pin in his lock, Mr. Daemmrich said, "Pay your whole rent." Mr. Schwalbe then attempted to retrieve the pin with the vise grip, but apparently broke off the tip of either his key or the pin, so that his key still could not open the door. At no time did anyone ever indicate to Mr. Schwalbe that either Robert Daemmrich or anyone else on behalf of the Defendant-Appellant, had placed the pin in the door lock. As a result of not being able to enter his

room, Mr. Schwalbe apparently left, sought other lodging and, he claims, finding none in the entire City of Milwaukee, spent a night or two in his pick-up truck. This statement was unsupported. After the management of the Sydney Hotel had drilled out the lock cylinder of Mr. Schwalbe's room, Mr. Schwalbe, still not even willing to consider paying his rent, was allowed to return and retrieve his personal belongings. Mr. Schwalbe was determined to leave a number of objects in the room, even though he had the opportunity to remove them. These objects were held for him by the Sydney Hotel staff, although he refused to remove them. One of the problems that the management of the Sydney Hotel had with regard to Mr. Schwalbe's lock was that this lock was placed on the door by Mr. Schwalbe, and all of the keys were retained by him. Thus, the management of the Sydney Hotel could not, in any emergency, gain entrance into the room. If a licensed hotel has to start eviction suits to remove a non-paying tenant, all hotels everywhere are doomed. This hotel,

licensed by the City and State, must be treated equally with every other annually licensed hotel.

A counterclaim was interposed in this matter, due to the substantial damage caused in each of the three apartments occupied by Mr. Schwalbe, including broken railings, damaged roof, broken windows, missing drapes and a generally filthy condition caused by Mr. Schwalbe's drinking and weird habits. Mr. Schwalbe was also substantially in arrears in his rental payments, and this, also, was incorporated into the counterclaim. During the trial of this action, Defendant-Appellant attempted to interpose the right, under the Wisconsin Innkeepers Lien Statute, of a landlord hotel keeper to bar the tenant from entrance into his room for failure to pay rent. Furthermore, Defendant-Appellant attempted to show that the Innkeepers Lien Statute applied to him as a holder of a hotel license for the City of Milwaukee and the State of Wisconsin. While the Trial Court said it would take judicial notice of the Wisconsin Innkeepers Statute, the Trial Court

would not permit any evidence on the issue of whether or not Defendant-Appellant was operating a hotel, or whether or not Defendant-Appellant had the right to prohibit tenant's entry into their rooms for failure to pay rent. A special verdict question and jury instruction on this issue were requested by Defendant-Appellant's attorney, both of which were denied by the Trial Court. This issue was also addressed on Motions After Verdict by the Defendant-Appellant's attorney, all of which were abruptly denied by the Trial Court. The Defendant-Appellant's attorney was not permitted to argue any part of this issue to the jury in closing arguments, although the Defendant-Appellant vigorously denied participating in any scheme to have this pin or object inserted into the Plaintiff's keyhole, and although the evidence supporting this was circumstantial, at best, the jury found that the Plaintiff had been unlawfully evicted by acts of the Defendant-Appellant, and awarded compensatory and punitive damages. Defendant-Appellant asserted that the issue of the

Wisconsin Innkeepers Lien Statute and Section 9-503 of the Uniform Commercial Code are dependent upon factual determinations which were an issue during this trial, and, therefore, should have been decided by the Trial Court as a matter of law or should have been presented as jury questions. The absence of such questions, instructions, and arguments resulted in a travesty of justice, and, hence, the Defendant-Appellant appeals from the judgment entered against him in this regard. Another error on the part of the Trial Court was his refusal to adjourn the case for the Defendant-Appellant who was a participant and his own attorney in a case before Judge Barron throughout almost all of this trial, being allowed only to leave for a short time to testify as a witness in the instant case.

The Trial Judge acted arbitrarily and capriciously in singling out the well managed Hotel Sydney to become a second rate business deprived of equal opportunities in the City of Milwaukee and State of Wisconsin.

A motion for new trial was brought and heard August 30, 1982 before Milwaukee County Circuit Judge Sheedy. The transcript of this trial, pp. 1 and 2 shows that counsel for Defendant said:

"MR. NEWCOMB: Your Honor, this is a motion for a new trial based upon newly discovered evidence. The defendant points out in the affidavit that at page 62 of the transcript the plaintiff responded to a question as to whether he had ever been convicted of a crime, yes or no, he said yes. And how many times, he said one. The affidavit sets forth those other convictions which the defendant has been able to find. And we point out to the court that we have requested of the Wisconsin Crime Information Service Center in Madison for a complete record, but they will not issue such a report unless this court orders it. And so at this time, your Honor, I would like to move the court for an order to permit us to examine the records of the Wisconsin Crime Information Service Center to see whether there are any additional violations running to the testimony. And I would point out that at page three of the affidavit there is a listing of a numerous number, that is, a large number of convictions and including--and included in them are a -- convictions for damaged property. And I believe, your Honor, while I did not try the case, it's my understanding from the transcript that one of the principal issues that was to be considered by the jury was damage to property as to who did what damage."

The Court thereafter asked the following question: (Tr. p. 2)

"THE COURT: But again, based on--looking at your affidavit, you say he admitted of being the victim only of one crime; the other seven matters here are all ordinance violations, aren't they?"

Counsel for Defendant-Appellant argued as follows: (Tr. pp. 2, 3, 4)

"MR. NEWCOMB: Yes, your Honor, they are; but you see, we cannot complete the record because of the denial of the record by the Wisconsin Crime Information Service Center, which director has stated he will not release those records of Mr. Schwalbe unless you order him to for the purposes of this motion, which is why I ask for that Order. I would state to you secondly, your Honor, in relationship of the municipal court violations, sec. 939.12 and 22 state that a crime -- In order words, your Honor, I believe you are taking the position that a crime is and arises only out of a conviction and because a conviction is in municipal court it is, therefore, not a crime within Wisconsin law. I would point to 939.12 and 22 which states that a crime is conduct punishable--prohibited by state law and punishable. Conduct punishable. In other words, it's the conduct which constitutes the crime. And those violations in municipal court were for criminal damage to property. Now, that's a misdemenor, in municipal court, your Honor. If municipal court is restricted to civil actions, how can it be a criminal damage to property. It's as, and I am sure the court is well aware of the plea bargaining that goes on in reducing counts. That does not meet the test of the definition of crime as a crime is conduct. Clearly, criminal damage to property--there are two such counts in the list that is here--all of this raises, your Honor, the -- I believe, the issue of whether it would not be proper in the court's discretion today to adjourn, allow the defendant to pursue the Wisconsin Crime Information Service Center for whatever records they have with Mr. Schwalbe. It suggests this pattern of conduct, and I appeal to the court -- "

The Court replied: (Tr. p. 4)

"Of course, again, you know--as I say, you weren't in the original trial which took better than a week at the time of trial. But if your office was able to get these convictions for the purpose of this motion, why didn't you procure them at the time of trial? That's what-- you see, I have a certain amount of discretion under 906.09 as to the admission of these matters. And I am not going to prejudge it today, but I don't think I would look too kindly on municipal violations. And he did admit to one conviction which went to his credibility."

ARGUMENT I. COUNSEL WAS TOLD BY THE TRIAL JUDGE HE WAS FREE TO APPEAL AND DENIED THE MOTION UNDER AUTHORITY OF WISCONSIN STATUTES SECTION 806.07.

In his argument on this motion, counsel for Defendant-Appellant stated to the Trial Judge as follows: (Tr. pp. 4,5)

"MR. NEWCOMB: There was no knowledge on the part of the defendant that there were any crimes whatsoever. I believe that trial counsel was startled by the answer yes and that in the aftermath of it began the investigation as to whether that was then a correct answer.

"THE COURT: Of course, you could have found out, if discovery had been taken that could have been found out, and they wouldn't have been startled at the time of trial. I mean, all they had to do was take a deposition of him and say have you ever been arrested and convicted of a crime. And if it goes to his credibility, they would have have been able to go into details, but they would have discovered it at that time."

Counsel for Plaintiff stated as follows: (Tr.pp.6,7,8)

"MR. GRAMLING: ...With respect to the points just raised, your Honor, I was brought in to Mr. Eisenberg three times on depositions on this case, and my client was deposed on three different occassions. And among the questions that he was asked was one relative to criminal convictions. Mr. Schwalbe, the court may recall, was not a litigant who had an accurate memory on all matters that he was questioned upon.

"THE COURT: The court will stipulate that he wasn't the best witness in the world. I will go along with that.

"MR. GRAMLING: Now, at his depositions he said he was convicted several times. I got the DA's office to run the computer check. And they got the record that he was convicted of one criminal offense. And that's on the record here today. I brought a motion in limine for the purpose of restricting, preventing Mr. Eisenberg from suggesting at trial that he was convicted two or three times when the evidence would be only one. And the court prior to trial indicated that the testimony would be limited to one criminal conviction based upon that representation. That is the fact. That's all that they have been able to produce. They have had a year and a half, Judge, or more to get this evidence. And now they have brought it in at this very late date. I believe the motion is well out of time and furthermore, has no basis at all. I would ask that the motion be denied and that costs be awarded to the plaintiff. ...

"THE COURT: No, And I am afraid, Counsel, your motion is denied. If you want to take it up again, you are free so to do. But I am going to deny it, because it does not comply with 806.07, and I am also going to deny it, because I think there is a failure here of due diligence."

Section 805.15(1) Wisconsin Statutes provides that a party may move to set aside a verdict and for a new trial because of newly discovered evidence or in the interest of justice.

Section 806.07 Wisconsin Statutes provides that a motion may relieve a party from a judgment on the grounds of newly discovered evidence which entitled the party to a new trial under Section 805.15(3).

Section 806.07(2) Wisconsin S atutes says:

"Motion shall be made within a reasonable time, not more than one year after the judgment was entered ... and if based on Sub. (1)(a), (which lists mistake, inadvertence, surprise or excusable neglect) or (c) (which lists fraud, misrepresentation or other misconduct of an adverse party."

Further more, the intent of the Legislature was clear when it provided, in Section 806.07(2):

"...A motion made under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court."

Certainly, perjury is a "fraud on the court."

II. THE COURT DID NOT RULE ON THE CONVICTION ISSUE RAISED IN THE MOTION FOR NEW TRIAL.

In the affidavit attached to the motion for new trial paragraph 11 states as follows:

"Affiant further states that he consulted with Attorney Miriam L. Eisenberg, who spoke to Robert McGrath, who is in charge of the Wisconsin Crime Information Service Center in Madison, Wisconsin, concerning the criminal record of Plaintiff on July 19, 1982. Affiant is informed that Mr. McGrath then stated that other convictions for Robert Ernest Schwalbe which are in the Wisconsin Crime Information Service Center can be released only by Order of a Circuit Court Judge. Therefore, this affidavit is also made for the purpose of requesting the Judge to order forthwith that the Wisconsin Crime Information Service Center in Madison, Wisconsin, release any and all records of any and all

criminal convictions of the Plaintiff.

The Court summarily dismissed paragraph 10 of the affidavit aforesaid, saying that paragraph 10 only referred to one "criminal conviction." The convictions were all marked as exhibits, and made a part of the affidavit referred to. Section 939.12 Wisconsin Statutes defines crime as "conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punished only by a forfeiture is not a crime." The record is clear that with respect to Case M-8052321, adjudicated August 22, 1980, Plaintiff was fined for loitering or prowling, convicted, serving six days in the House of Correction. On February 10, 1978, he was convicted of criminal damage to property, and spent twenty days in the House of Correction.

Section 939.12 Wisconsin Statutes does not provide that one must be guilty of a felony to have been considered to commit a crime. The words, "conduct punished only by a forfeiture is not a crime," certainly do not cover the disposition of

a case, but refer, instead, to the punishment available to the Court in deciding the case. If one is placed on probation, he might still be guilty of a crime.

Mr. Schwalbe, by stating he was only convicted of a crime once, created with the jury the impression that he was a pretty decent fellow. They reacted accordingly.

At the time of the original trial on December 15, 1980, the following colloquoy took place: (Tr. pp. 10,11,12,13)

"THE COURT: I understand you have a motion in limine, Mr. Gramling?

"MR. GRAMLING: That's correct, your Honor. There are three items that I have indicated in the motion I believe ought to be specified by the judge as items that ought to be off limits during this trial. First of all, during Mr. Schwalbe's deposition he was questioned about prior conviction of crimes. His testimony was very uncertain. As the question was posed, he was asked how many times he was in jail, how many times he had been to court, and so on. And he did indicate that he may have been convicted of three crimes or more. Since that time I have contacted the district attorney's office in an effort to learn how many times he had been convicted. And I have been told that based upon his rap sheet he's been convicted of one crime, and that was during the year 1980.

"THE COURT: What was the offense?

"MR. ADERMAN: Excuse me, excuse me. At this point may I discuss this first about this crime.

"THE COURT: Let me find out what the crime is first.

"MR. ADERMAN: Oh, oh.

"THE COURT: Yes.

"MR. GRAMLING: It was disorderly conduct or destruction of property.

"THE COURT: It had nothing to do with funds or anything that would go to credibility?

"MR. GRAMLING: Nothing like that at all.

"THE COURT: What about that, Mr. Aderman?

"MR. ADERMAN: Your Honor, all we want to do is ask if he was convicted of a crime; secondly, how many times.

"THE COURT: Once.

"MR. ADERMAN: If he says once, that's it.

"THE COURT: Fine. That's all.

"MR. GRAMLING: I have no objection to that. It's the impeachment --

"THE COURT: I will not permit you to go into it. The only time, as I understand it, under the rule, as I understand it, that you can go into the crime is if he has been convicted of something like perjury or something that goes into his testimony.

"MR. ADERMAN: I wasn't going to go into it.

"MR. GRAMLING: I thought that they might want to impeach based upon his deposition testimony.

"THE COURT: What's the next one?

"MR. GRAMLING: Secondly, there were some statements made at the deposition by Mr. Eisenberg and some questioning regarding I guess what I believe--all his antisocial conduct or misconduct that I don't believe is relevant to the issues in the case. And I wanted to indicate that I thought these areas would be inappropriate during trial.

"MR. ADERMAN: I don't know what he is talking about.

"THE COURT: Well, evidently the police were called a number of times. I can't see where that has any bearing in the case.

"MR. ADERMAN: No, it doesn't.

"THE COURT: Okay. Granted. And the third?...."

In 1948, Attorney Sydney M. Eisenberg appeared for the Appellant in the case of State v. Roberson, 254 Wis. 595, the Supreme Court stated as follows:

"The trial court's admission into evidence of the nature of the offense of which the defendant was convicted in 1944 for the purpose of reflecting his credibility as a witness, was not an abuse of discretion. Meyers v. State(1927), 193 Wis. 126 213 N.W. 645.

It appears only fair that the Court should have granted a motion requesting an order forthwith to

the Wisconsin Crime Information Service Center at Madison, Wisconsin to release any and all records of any and all criminal convictions of the Plaintiff. To say that such an order should have been granted ahead of the time of the trial is unfair. It would mean that anyone can perjure himself in a trial without an adverse party being given an opportunity to check on such a situation.

When Mr. Schwalbe committed his crime of May 14, 1980, Exhibit C shows this was for criminal damage to property. Certanly, the jury should have been told of this conviction because he was accused of damaging property in the instant case.

It is also submitted that Mr. Schwalbe's predisposition to damaging property was demonstrated in the conviction relating to the offense of December 2, 1977, whereafter Mr. Schwalbe was found guilty of criminal damage to property by intentionally kicking the complainant's vehicle,

causing damage. While this case involves a forfeiture, Mr. Schwalbe's criminal damage to property predilection and habits appear to be typical of the man.

Obviously, the antisocial conduct of Mr. Schwalbe as expressed in the six convictions referred to were pertinent, and certainly some, if not all of the convictions should have been permitted to be shown.

To say that Attorney Aderman was required to know that Mr. Schwalbe was going to prejure himself during the trial is unfair. Counselor Aderman had a right to assume that Mr. Schwalbe was telling the truth.

Certainly, the jury, in inflicting a huge penalty against Mr. Eisenberg, under all of the circumstances, is unfair. One can hardly believe that the jury would have acted in the manner it did if the true character of Mr. Schwalbe had been exposed. Mr. Gramling's statement at the time of his motion in limine to preclude Mr. Aderman

from developing Mr. Schwalbe's record was based on a hearsay statement when he said he contacted the District Attorney's office in an attempt to learn how many times Mr. Schwalbe had been convicted. Obviously, the District Attorney's office is not a repository of the records pertaining to this man's convictions in a civil case, and the Court was in error when he accepted such a statement as being absolutely factual.

This motion should not have been brought at the time of the trial, but should have been in writing previous to the time of trial, so that an investigation could have been made. Nevertheless, the case was permitted to go to judgment. On the basis of motion for new trial, however, one must compare the record that was ultimately discovered by the Defendant, with the statement referring to only one conviction by the Plaintiff.

Defendant takes the position that the mere fact that the case was tried in Municipal Court means nothing. Many murder trials took place in the Municipal Court of Milwaukee County. One must consider the definition of crime expressed in Section 939.12 Wisconsin Statutes as the law of the State of Wisconsin. If the conduct is prohibited by state law and punishable by either fine or imprisonment or both, there can be no question about the matter. Obviously, the city is a creature of the state.

Hammen v. State, 87 Wis. 2n 791, held that "evidence of prior conduct, such as defendant's threat to shoot his companion, was admissible to show that defendant's later acts evinced a depraved mind under 940.23."

State v. Stawicki, 93 Wis. 2d 63, held "evidence of defendant's prior fighting was admissible to refute defendant's claim of misidentification and to impeach defense witness."

Section 904.05(2) Wisconsin Statutes, entitled, "Specific Instances of Conduct," states:

"In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct."

In the instant case, the Trial Court obviously had no intention of permitting Defendant to establish the true evidence of character or traits of character.

The fact is that in the motion for new trial Defendant now proves that he can establish specific instances of conduct.

Section 904.04(2) Wisconsin Statutes, entitled "Other Crimes, Wrongs, or Acts," states:

"Other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This sub-section does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plans, knowledge, identity or absence of mistake or accident."

Section 904.06 Wisconsin Statutes, states as follows:

"904.06 Habit; routine practice. (1) Admissibility. Except as provided in s. 972.11(2), evidence of the habit of a person or other routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

"(2) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion

or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."

The case of State v. Johnson, 74 Wis. 2d 26, also states:

"Evidence of delinquency in making withholding tax payments by three other corporations of which the accused had been president was admissible to show willingness of accused and failing to make such payments as president of Forest Corporation."

It is interesting to note that with respect to the jury verdict involved herein, $1,000.00 was given to the plaintiff for compensatory damages and $5,000.00 was given to him for punitive damages. The jury found that Plantiff Schwalbe owed Defendant $242.00 in back rent. Nothing was granted to the Defendant for all the damages committed to the property in the hotel by the Plaintiff. If the jury had known that the Plaintiff delighted in damaging property, the question is whether or not the jury would have acted differently.

The Court was in error when he denied permission for the Defendant to examine the records of Wisconsin Crime Information Service Center to see if there

were any additional violations running to his testimony.

The Court was in error when he refused to permit the Defendant's attorney to refer to the nature of the charges involving the conviction. It would not make sense that criminal damage to property should not be considered a crime. In any event, here are some of the known offenses which Defendant did discover after trial, some of which occurred in communities outside of Milwaukee:

Municipal Court) Milwaukee, Wis.)	Case No. M-8052321 8/22/80. Loitering or prowling; Convicted; served six days in the House of Correction.
Municipal Court) Milwaukee, Wis.)	Case No. M-8064334 12/29/80. Convicted of disorderly conduct; paid a fine of $84.00.
Circuit Court) Milwaukee County) Wisconsin)	Case No. 2-250743. 9/5/80. Convicted of criminal damage of property. Restitution/Probation.
Municipal Court) Cudahy, Wis.)	Case No. C-03996 2/10/78. Convicted of issuance of a worthless check. Restitution.
Municipal Court) South Milwaukee) Wisconsin)	Case No. A-11355 4/12/77. Convicted of disorderly conduct. Fined $125.00.

The following conviction was subsequent to the jury trial, but is brought in as an example of the continued misconduct:

Municipal Court)	Case No. A-14776 2/10/82. Con-
South Milwaukee)	victed of disorderly conduct.
Wisconsin)	Thirty days House of Correction.

Photostats of the certified copies of judgments of conviction are attached hereto, market "Exhibits A, B,C,D,E,F," and made a part hereof.

Together with Defendant's answer he filed an affirmative defense and three counterclaims, as follows:

"FIRST COUNTERCLAIM

1. Defendant reiterates and realleges all the matters in his Answer, as though fully set forth herein, and further alleges:

"2. That the plaintiff, during his tenancy at 770 North Marshall Street, Milwaukee, Wisconsin, improperly and illegally damaged the three apartments, nalely, Apartments 205,701, and 603, in the following manner:

"Apartment 205: Replace window broken by plaintiff, 24"x26". Furniture and carpet had to be cleaned and repaired. Apartment in filthy condition, required cleaning.

"Apartment 701: Repair railing on patio and repair roof, as well as broken railing on roof. Replace all drapes and curtains from the apartment, which had been thrown out of window.

"Apartment 603: Remove cards, decals, signs, etc. on freshly painted entrance door to apartment, which caused paint to peel off, and door has to be repainted. Apartment left in a filthy condition, had to be cleaned.

"That the damages are $1,500.00 total.

"SECOND COUNTERCLAIM

As and for a second and separate Counterclaim, defendant alleges that the plaintiff owes rent in the sum of $302.00; plaintiff further paid other rents to defendant's agents through two checks returned from the bank marked "Not sufficient funds."

"THIRD COUNTER CLAIM

1. As and for a third and separate Counterclaim, defendant alleges that the plaintiff is illegally holding and refusing to return a key to the front door of the premises, so that the security of the building cannot be maintained. That the cost of the key is $1.50, but because of the mailcious misconduct of the plaintiff defendant is entitled to an additional $2,500."

The Court's limitation against proving the propensity and inclinations of the Plaintiff to damage property would be mind-boddling to the average person

It is unfair to assume that Defendant's counsel was required to anticipate in advance the rulings of the Court and the Defendant's answers.

An affidavit in support of motion to supplement

the record was attached to the brief of Defendant-Appellant, orginally before the Court of Appeals. This affidavit by Attorney Louis B. Aderman indicates that Defendant, Sydney M. Eisenberg was trying a case at another court during most of the trial involved herein, and therefore was present in the instant case for only a short time. Obviously, no person can be expected to be in two trials at the same time.

Requiring Attorney Aderman to proceed with the trial only complicated the difficulty Mr. Aderman had in trying the case. The affidavit in question is part of the appendix herein.

III. FAILURE TO INSTRUCT JURY ON PETITIONER'S STATUTORY RIGHT TO PLACE A LIEN UPON THE EFFECTS OF RESPONDENT AND TO BAR RESPONDENT FROM ENTRY FOR FAILURE TO PAY RENT, CONSTITUTED PLAIN ERROR AFFECTING PETITIONER'S SUBSTANTIAL RIGHTS AND AMOUNTING TO A GRAVE INJUSTICE.

Failure to instruct the jury in relation to Petitioner's statutory right pursuant to § 779.43, Wisconsin Statutes Ann. § 779.43 (West 1977), to place a lien upon the effects of the Respondent for his failure to pay rent, constituted a serious trial error resulting in a grave injustice, and a

denial of fundamental fairness in the trial. § 779.43 provides that a keeper of a hotel may place a lien upon the effects of any guest liable for accomodations owing the keeper. Because of certain technicalities such as not having certain signs posted in the rooms, Petitioner's Sydney Hotel was held not to be a hotel under the law, and consequently, the court denied his request for jury instructions since he was deemed not to possess the rights under § 779.43. The Court failed to realize that § 779.43(2) includes within its definition of hotel keeper, the keeper of a "lodging house." Thus, even if Petitioner is not considered a hotel keeper, he is at the very least the keeper of a lodging house. Consequently, Petitioner was entitled to the rights provided such a keeper under § 779.43. Had the jury been informed that Petitioner's alleged act of inserting an object into Respondent's key hole, even if found to be true, was an act in accordance with the law, the outcome of the trial beyond doubt would have been substantiality changed. This is clear in light of the drastiely high

punitive damage award to Respondent. While the test for plain error does not implicate an issue of probable different result on trial, Virgil v. State, 84 Wis. 2d 166, 267 N.W.2d 852 (1978), such error may be considered in relation to their combined effect on the jury's fact-finding function, U.S. v. Freeman, 514 F.2d 1314 (1975). (Federal law in relation to plain error is highly relevant in defining the scope of the state rule, Virgil.)

Respondent not only owed rent which he attempted to pay by check with insufficient funds, but also caused substantial damage to Petitioners premises. Petitioner had thus acted in accordance with the law as a hotel keeper under § 779.43. The trial court misconstrued § 779.43 by not realizing that Petitioner was at the very least the keeper of a lodging house and therefore entitled to the rights provided in § 779.43. The trial courts mistaken view of the law caused it to commit serious error in not instructing the jury on Petitioners rights under the statute.

A failure to instuct the jury which affects

a parties' substantial rights, even though an objection to the instructions given may not have been timely, constitutes plain error justifying a new trial. See e.g. United States v. Sisto, 534 F. 2d 616 (5th Cir. 1976); United States v. Cox, 536 F. 2d 65 (5th Cir. 1976), citing United States v. Garcia, 530 F. 2d 650 (5th Cir. 1976). Failure to inform the jury of Petitioners right under the statute prevented the jury from viewing this case in light of the controlling law and thereby denied Petitioner of a trial in accord with traditional and fundamental standards of due process under the Fourteenth Amendment.

Surely, the trial courts serious error in failing to give instructions on Petitioners statutory rights, affected Petitioners substantial rights, that being a fair trial in comtemplation of the law which is clearly a fundamental and constitutional right guaranteed by due process.

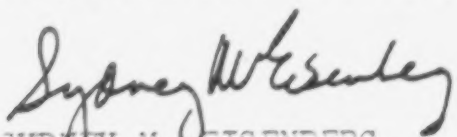
A grave injustice would be carried out if the case at bar is not returned to trial. Petitioner prays that this court will utilize its recognized power, recently reaffirmed, to review plain error when necessary to prevent unfairness.

Wood v. Georgia, 450 U.S. 261, 265, n.5 (1981).

IV. CONCLUSION

Defendant requests that the case be remanded to the Circuit Court of Milwaukee County, Wisconsin, that the motion for new trial be allowed, and that the judgment entered in the case be vacated, set aside and held for naught, with the case ordered retried.

Respectfully submitted,



SYDNEY M. EISENBERG
Defendant-Appellant

P. O. ADDRESS:

1131 West State Street
Milwaukee, WI 53233
414/271-0931

INDEX TO ORDERS

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

ROBERT SCHWALBE

Plaintiff

vs.

SYDNEY M. EISENBERG

Defendant

ORDER FOR JUDGMENT AND JUDGMENT

Case #519-205

The above-entitled action having been tried before this Court, the Honorable Patrick T. Sheedy presiding, and a jury on the 15th, 16th, 17th, 18th, and 19th days of December, 1980, and

The plaintiff Robert E. Schwalbe, 708 East Lyon, Milwaukee, Wisconsin, who is retired, appearing by his attorney, James A. Gramling, Jr., and the defendant, Sydney M. Eisenberg, 3901 North Lake Drive, Milwaukee, Wisconsin, who is an attorney, appearing by his attorney, Louis B. Aderman; and

The jury having returned its verdict on

December 19, 1980, and the plaintiff having filed his motion for judgment on the verdict and the defendant having filed his motions after verdict, all of which are on file herein, and having been presented to the Court; and

The Court having heard the oral arguments of counsel and having before it the brief filed by defendant, and after due and careful study of the complete record in this case and the Court having rendered its decision in open Court on January 19,1981, wherein it determined that the plaintiff was entitled to judgment on the verdict as rendered herein,

Now, therefore, upon all the files, records and proceedings herein, it is hereby ordered and adjudged that:

1. Plaintiff's motion for Judgment upon the verdict be and the same is hereby granted.

2. Defendant's motions after verdict be

and the same are hereby denied.

3. Defendant's Third and Fourth Counterclaims are hereby dismissed with prejudice.

4. Paragraph 9 and the Prayer of Count I of plaintiff's Complaint are hereby amended to claim punitive damages in the amount of Five Thousand and No/100 Dollars ($5,000).

5. Plaintiff shall have and recover of defendant the total sum of Five Thousand Seven Hundred Fifty-eight and No/100 Dollars ($5,758), which sum represents the difference between plaintiff's recovery on his Complaint of One Thousand Dollars ($1,000) as actual damages and Five Thousand Dollars ($5,000) as punitive damages, and defendant's recovery on his Second Counterclaim of Two Hundred Forty-two Dollars ($242).

6. Plaintiff shall further have and recover interest from December 19,1980, the date of verdict, and his taxable costs, fees

and disbursements.

The entry of Judgment shall be stayed for 60 days starting with January 19, 1981.

Dated at Milwaukee, Wisconsin, this 11th day of February, 1981.

BY ORDER OF THE COURT

/s/ Patrick T. Sheedy
PATRICK T. SHEEDY, Judge
Circuit Court -
Civil Division

Judgment entered this 19th day of March, 1981.

By the Court

FRANCIS X. MCCORMACK
CLERK OF CIRCUIT COURT

By: /s/
Deputy Clerk

Filed - March 19, 1981, Francis X. McCormack Clerk

March 19, 1981 - Costs taxed this date in the sum of $470.84.

Court of Appeals Decision Dated and Released

January 13, 1982

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

NOTICE

This opinion is subject to further editing, if published the official version will appear in the bound volume of The Official Reports.

No. 81-599

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT 1

ROBERT SCHWALBE,

Plaintiff-Respondent

v.

SYDNEY M. EISENBERG,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee county: PATRICK T. SHEEDY, Judge. Affirmed.

Before Decker, C.J., Moser, P.J., and Randa, J.

PER CURIAM. The respondent, Robert E. Schwalbe, commenced an action against the appellant, Sydney M. Eisenberg, seeking compensatory and punitive damages for an illegal eviction. Although Schwalbe also sought damages for conversion of his personal property, that count was dismissed after Eisenberg returned the property. That claim is not an issue on appeal. Eisenberg counterclaimed for damages for back rent, property damage, malicious conduct and abuse of process. The jury found that Schwalbe had been illegally evicted and awarded him $1,000 in compensatory damages and $5,000 in punitive

damages. It also found that he owed Eisenberg back rent in the amount of $242. The trial court granted judgment accordingly.

On appeal, Eisenberg challenges the failure of the trial court to grant a continuance and to instruct the jury on the question of whether Eisenberg was operating a hotel. The record does not support the assertion that Eisenberg ever moved the trial court for a continuance. That issue is therefore waived. Eisenberg did not request that the trial court include in its instructions or special verdict any question regarding the issue of whether the building was operated as a hotel. However, even if that issue were preserved for appeal, the evidence presented at trial is overwhelming. The Sydney Hotel was not operated as a hotel. We affirm.

CONTINUANCE

A motion for continuance is addressed to

the sound discretion of the trial court. Smith v. Plankinton de Pulaski, 71 Wis. 2d 251, 257, 238 N.W. 2d 94, 98 (1976). A motion for continuance must be formally and timely made to the trial court. Id. at 258, 238 N.W. 2d at 98-99. There is nothing in the record to establish that Eisenberg ever requested that the trial court grant him a continuance. That constitutes waiver.

Eisenberg also argues in conjunction with this issue that the trial court's failure to grant an ex parte oral request of his attorney for a continuance of the trial denied Eisenberg the constitutional right to be present at trial and to cross-examine witnesses against him. The ex parte oral request was apparently made in chambers and is not a part of the record on appeal. Even if Eisenberg had properly preserved his alleged motion for a continuance, his argument that the trial

court's failure to grant him a continuance violated his constitutional right to appear at trial is without merit. See Brons v. Bischoff, 89 Wis. 2d 80, 90, 277 N.W. 2d 854, 858 (1979).

HOTEL OR APARTMENT BUILDING

It was Eisenberg's position at trial that he did not unlawfully evict Schwalbe because Eisenberg was operating a hotel, not an apartment building, and that his actions were permissible pursuant to sec. 779.43, Stats. He argues on appeal that the trial court erred by failing to instruct the jury on a hotelkeeper's right to place a lien on a guest's property until charges for his room are paid.

The record establishes that Eisenberg did not object to the form of the proposed jury instructions or the jury verdict. At no time during the trial did the trial court, as Eisenberg suggests, limit either party's

right to present evidence on the hotel issue. However, Eisenberg did give the trial court a copy of a case which dealt with the issue of constructive eviction. That alone is not sufficient to preserve for appeal Eisenberg's argument that the trial court refused to instruct the jury according to Eisenberg's requests. See sec. 805.13(3), Stats. See also Gierach v. Snap-On Tools Corp., 79 Wis. 2d 47, 52-53, 255 N.W. 2d 465, 467 (1977).

The evidence is overwhelming that Eisenberg was not operating a hotel. The Sydney Hotel, although licensed by the city and the state as a hotel, had a locked lobby, did not have a registration desk in the lobby, had a sign on the building which advertised apartments for rent, did not have signs posted in the rooms as required by sec. 50.58(2) and 50.84, Stats., and had occupants who paid a monthly rent for a substantial number of

years. The units in the building were all equipped with a kitchen area. Eisenberg advertised in the local newspaper that units in the building were apartments for rent.

In 1976, the city had inquired of Eisenberg why he had not paid the five percent hotel tax on his gross receipts. Eisenberg responded by letter, which was admitted at trial, that the Sydney Hotel was an apartment building and that if the status of the building changed he would immediately notify the city. The record is devoid of any evidence that the apartments were rented to transients within the meaning of secs. 66.75 and 77.52, Stats.

The evidence from the record clearly supports the conclusion that the building was operated as an apartment building and not as a hotel. Even if the trial court had erred in some manner in its instructions to the jury,

however, the result in this case would not have been different. Lutz v. Shelby Mutual Insurance Co., 70 Wis. 2d 743, 750-51, 235 N.W. 2d 426, 431 (1975).

By the Court.-- Judgment affirmed.

Not recommended for publication.

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNT
BRANCH 5

ROBERT E. SCHWALBE,
Plaintiff,
v.

Case No. 519-205

SYDNEY M. EISENBERG,
Defendant.

August 30, 1982 The Honorable Patrick T. Sheedy.
Circuit Court Judge, presiding

APPEARANCES:

Mr. James A Gramling, Jr., Attorney at Law, appearing on behalf of the plaintiff.

Mr. James C. Newcomb, Attorney at Law, appearing on behalf of the defendant.

P R O C E E D I N G S

THE CLERK: 519-205, Robert Schwalbe versus Sydney M. Eisenberg. Is anyone in court on that one yet?

MR. GRAMLING: James A. Gramling, Jr. on behalf of the defendant--

MR. NEWCOMB: James C. Newcomb for the defendant and movant, your Honor.

MR. GRAMLING: --plaintiff.

MR. NEWCOMB: Your Honor, this is a motion for new trial based upon newly discovered evidence. The defendant points out in the affidavit that at

page 62 of the transcript the plaintiff responded to a question as to whether he had ever been convicted of a crime, yes or no, he said yes. And how many times, he said one. The affidavit sets forth those other convictions which the defendant has been able to find. And we point out to the court that we have requested of the Wisconsin Crime Information Service Center in Madison for a complete record, but they will not issue such a report unless this court orders it. And so at this time, your Honor, I would like to move the court for an order to permit us to examine the records of the Wisconsin Crime Information Service Center to see whether there are any additional violations running to the testimony. And I would point out that at page three of the affidavit there is a listing of a numerous number, that is, a large number of convictions and including--and included in them are a--convictions for damaged property. And I believe, your Honor, while I did not try the case, it's my understanding from the transcript that one of the principal issues that was to be considered by the jury was damage to property as to who did what damage.

THE COURT: But again, based on--looking at your affidavit, you say he admitted of being the victim only of one crime; the other seven matters here are all ordinance violations; arent't they?

MR. NEWCOMB: Yes, your Honor, they are; but you see, we cannot complete the record because of the denial of the record by the Wisconsin Crime Information Service Center, which director has stated he will not release those records of Mr. Schwalbe unless you order him to for the purposes of this motion, which is why I ask for that order. I would state to you secondly, your Honor, in relationship to the municipal court violations, sec. 939.12 and 22 state that a crime--In other words, your Honor, I believe you are taking the position that a crime is and arises only out of a conviction and because a conviction is in municipal court it is, therefore, not a crime within Wisconsin law. I would point to 939.12 and 22 which states that a crime is conduct not conviction; a crime is conduct punishable--prohibited by state law and punishable. Conduct punishable. In other

words, it's the conduct which constitutes the crime. And those violations in municipal court were for criminal damage to property. Now, that's a misnomer, in municipal court, your Honor. If municipal court is restricted to civil actions, how can it be criminal damage to property. It's as, and I am sure the court is well aware of the plea bargaining that goes on in reducing counts. That does not meet the test of the definition of crime as a crime is conduct. Clearly, criminal damage to property--there are two such counts in the list that is here--all of this raises, your Honor, the--I believe, the issue of whether it would not be proper in the court's discretion today to adjourn, allow the defendant to pursue the Wisconsin Crime Information Service Center for whatever records they have with Mr. Schwalbe. It suggests this pattern of conduct, and I appeal to the court--

THE COURT: Of course, again, you know--as I say, you weren't in the original trial which took better than a week at the time of trial. But if your office was able to get these convictions for the purpose of this motion, why didn't you

procure them at the time of trial? That's what --you see, I have a certain amount of discretion under 906.09 as to the admission of these matters. And I am not going to prejudge it today, but I don't think I would look too kindly on municipal violations. And he did admit to one conviction which went to his credibility.

MR. NEWCOMB: Well, your Honor, I believe that I will say to you that as a matter of the experience among folks who have been lawyers and judges who have been in the law some time, with a man with a record as exists in this municipal court record, I would suggest that there is a whole lot more.

THE COURT: Yes, but you see at the time of trial why wasn't that information--

MR. NEWCOMB: There was no knowledge on the part of the defendant that there were any crimes whatsoever. I believe that trial counsel was startled by the answer yes and that in the aftermath of it began the investigation as to whether that was then a correct answer.

THE COURT: Of course, you could have found out; if discovery had been taken that could have been found out, and they wouldn't have been startled at the time of trial. I mean, all they had to do was take a deposition of him and say have you ever been arrested and convicted of a crime. And if it goes to his credibility, they would have been able to go into details; but they would have discovered it at that time.

MR. NEWCOMB: I totally agree, your Honor, it would have been a normal deposition question. But I don't believe a deposition was taken, and I Believe counsel was startled by that answer and--

THE COURT: You see, what you are doing now is using 20/20 hindsight. And I question whether or not that's-- Mr. Gramling, what is your position on this matter?

MR. GRAMLING: Well, I am surprised, your Honor. I am opposed to the motion on a couple of grounds. The court has pointed out two of them. First of all, I don't believe the municipal violations are crimes to the point where they could be introduced in evidence either for

impeachment purposes or for evidence of whatever conduct they were trying to prove at trial. I think more fatal to the motion is the fact that it's totally out of time. It's a motion for a new trial under new evidence, and I believe under 806.07 that motion must be brought within one year after the jury verdict. The verdict, as the court may recall, was returned on December 19, 1980. Mr. Eisenberg perhaps should be commended for his tenacity, but he's also proceeding here well beyond the time that he could lawfully bring a motion for a new trial based on this ground. With respect to the points just raised, your Honor, I was brought into Mr. Eisenverg three times on depositions on this case. And my client was deposed on three different occasions. And among the questions that he was asked was one relative to criminal convictions. Mr. Schwalbe, the court may recall, was not a litigant who had an accurate memory on all matters that he was question upon.

THE COURT: The court will stipulate that he wasn't the best witness in the world. I will go along with that.

MR. GRAMLING: Now, at his deposition he said he was convicted several times. I got the DA's office to run the computer check. And they got the record that he was convicted of one criminal offense. And that's on the record here today. I brought a motion in limine for the purpose of restricting, preventing Mr. Eisenberg from suggesting at trial that he was convicted two or three or four times when the evidence would be only one. And the court prior to trial indicated that the testimony would be limited to one criminal conviction based upon that representation. That is the fact. That's all that they have been able to produce. They have had a year and a half, Judge, or more to get this evidence. And now they have brought it in at this very late date. I believe the motion is well out of time and furthermore, has no basis at all. I would ask that the motion be denied and that costs be awarded to the plaintiff.

MR. NEWCOMB: Well, your Honor, as to the out of time, I believe an appeal proceeded and that it is not out of time. And in terms of the decision by the appellant court--

THE COURT: Of course, there is nothing in the statute that I can recall--

MR. NEWCOMB: I can't recall anything.

THE COURT: --to give you an extension because the matter goes on appeal.

MR. GRAMLING: I don't believe there is, Judge.

THE COURT: No. And I am afraid, Counsel, your motion is denied. If you want to take it up again, you are free so to do. But I am going to deny it, because it does not comply with 806.07; and I am also going to deny it, because I think there is a failure here of due diligence.

MR. NEWCOMB: Pardon me?

THE COURT: Due diligence on the part of Mr. Eisenberg at the time of trial. He had the right of discovery, and he should have found that out.

MR. GRAMLING: Thank you, your Honor. Costs?

THE COURT: No costs. Cost is denied.

STATE OF WISCONSIN)
) SS:
MILWAUKEE COUNTY)

I, Marilynn Miller, do hereby certify that I am a shorthand reporter; that I was present at the taking of the foregoing proceedings, and that I recorded the said proceedings on the Stenograph Machine; that the above and foregoing proceedings, consisting of pages 1 through 8, inclusive, is a full, true and correct copy, in typewritten longhand, of my original machines shorthand notes taken at said hearing.

Dated this 28th day of January, 1983.

/s/

reporter

STATE OF WISCONSIN : CIRCUIT COURT : MILWKEE COUNTY

ROBERT E. SCHWALBE,

Plaintiff,

ORDER

v.

SYDNEY M. EISENBERG,

Case No. 519-205

Defendant.

At a regular term of the Circuit Court for Milwaukee County, Wisconsin, begun and held at the Courthouse, in the City of Milwaukee, in said County, the Hon. Patrick Sheedy, presiding, the above entitled case having come on for hearing before the Court on August 30, 1982, on the motion to the defendant, Sydney M. Eisenberg, for an order for a new trial on the ground that plaintiff had testified untruthfully at trial on an issue effecting plaintiff's credibility; defendant Sydney M. Eisenberg, having appeared by James C. Newcomb, attorney at law, and the plaintiff having appeared by counsel, there be no other appearances, and the Court on reading the motion, record and papers in the case, and having heard the arguments of counsels, and being fully advised in the premises, denied the motion of the defendant, Sydney M. Eisenberg.

ORDER
Case No. 519-205

NOW, THEREFORE, IT IS ORDERED that the motion of the defendant, Sydney M. Eisenberg, for an order for new trial is denied.

Dated this 25th day of October, 1982.

BY THE COURT:

/s/
Patrick Sheedy
Circuit Judge

No. 82-2256

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

COURT OF APPEALS
DECISION
DATED AND RELEASED

OCT 25 1983

ROBERT E. SCHWALBE,
Plaintiff-Respondent

v.

SYDNEY M. EISENBERG,
Defendant-Appellant.

APPEAL from an order of the circuit court for Milwaukee county: PATRICK T. SHEEDY, Judge. Affirmed.

Before Wedemeyer, P.J., Decker and Moser, JJ.

DECKER, J. Sydney Eisenberg(Eisenberg) appeals from an order denying his motion for a new trial on the ground of newly discovered evidence. We affirm the trial court's order, holding that the motion was untimely under secs. 806.07 and 805.16, Stats., and that due diligence was not exercised. We further conclude that there was no fraud upon the court.

Robert Schwalbe(Schwalbe) brought an action against Eisenberg seeking compensatory and punitive damages for an illegal eviction from the Sydney Hotel. Eisenberg counterclaimed for damages for

back rent, property damage, malicious conduct and abuse of process. The jury found that Schwalbe had been illegally evicted and awarded him compensatory and punitive damages. Judgment was entered on March 19, 1981.

Eisenberg appealed to this court and we affirmed the judgment on January 13, 1982.[1] On July 20, 1982,[2] Eisenberg made a motion in the trial court for a new trial on the basis of newly discovered evidence, alleging that Schwalbe concealed prior convictions and asking for a court order requiring the Wisconsin Crime Information Service Center to release "any and all records of any and all criminal convictions" of Schwalbe.

The trial court denied the motion in an order dated October 25, 1982. In the hearing on the motion, the trial court stated that the motion was denied because it did not comply with sec. 806.07, Stats., and because there was a failure of due diligence in discovering this evidence at the time of trial. Eisenberg appeals.

Section 806.07, Stats., states in pertinent part:

> 806.07 Relief from judgment or order. (1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:
>
> . . . . .
>
> (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
>
> . . . .
>
> (2) The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub.(1)(b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court. (Emphisis added.)

Section 805.16, Stats., in turn, provides:

> 805.16 Time for motions after verdict. Upon rendition of verdict, the judge shall in open court set dates for serving and filing motions and briefs and for arguing motions. No notice of motion need be served for motions after verdict. The dates for hearing arguments on motions shall be not less than 10 nor more than 60 days after verdict. If an order granting or denying a motion challenging the sufficiency of evidence or for a new trial is not entered within 90 days after verdict, the motion shall be deemed denied. Notwithstanding the foregoing, a motion for a new trial based on newly discovered evidence may be made at any time within one year after verdict. Un-

> less an order granting or denying the motion is entered within 30 days after hearing, the motion shall be deemed denied. (Emphasis added.)

Eisenberg's brief-in-chief ignores the fact that this motion for a new trial on the basis of newly discovered evidence was untimely by at least five months. Instead, it appears to contend that Schwalbe's alleged perjury constituted fraud on the court, the raising of which is not governed by the one year limit. See sec. 806.07(2), Stats. We do not agree that there was any fraud on the court perpetrated and we affirm the trial court's order. We further determine that an allegation of fraud on the court required here the instigation of independent action pursuant to sec. 806.07(2), Stats.

Prior to trial, Schwalbe was deposed three times by Eisenberg. At one of these depositions, Schwalbe was asked several questions concerning criminal convictions. He responded that he had possibly three. Schwalbe's attorney later obtained specific information from the district attorney's office that there was only one conviction in

their records. He brought this to the trial court's attention in a motion in limine. Eisenberg's attorney acquiesced without objection to the number of convictions being only one. At that point, Eisenberg knew of the discrepancy between the deposition testimony and the district attorney's records, but apparently chose not to pursue it through additional discovery. As Eisenberg's affidavit in support of his motion for a new trial states: "When Defendant discovered that his appeal was not fruitful, he personally started examining (sic) the record, and made inquiry as to whether or not Mr. Schwalbe had committed perjury on any salient point in the case." Nowhere in the motion or in the supporting affidavit does Eisenberg allege fraud on the court.

Our review of the record leaves us unpersuaded that any fraud on the court was perpetrated. Schwalbe's response to Eisenberg's deposition questions was a confused answer to confusing questions. We read Eisenberg's affidavit in support of his motion for a new trial as merely suggesting that, if Schwalbe has further convictions, they would be revealed only upon court order.

We note that sec. 806.07(2), Stats., provides that: "This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to set aside a judgment for fraud on the court." This provision has been interpreted to require the commencement of a new and separate proceeding by filing a summons and complaint. See Ennis v. Ennis, 88 Wis. 2d 82, 89, 276 N.W.2d 341. 344 (Ct.App. 1979); see also Doheny v. Kohler, 78 Wis. 2d 560, 564, 254 N.W.2d 482, 484 (1977). No independent action was so brought in this case. We further state that Eisenberg's pretrial knowledge of the alleged discrepancy in Schwalbe's conviction record would estop him from bringing an independent action.

We believe that the trial court properly treated the motion as one arising out of newly discovered evidence rather than fraud on the court.[3] Hence, the motion was untimely and, our review of the record persuades us, the trial court was correct in its determination of a lack of due diligence.

By the Court.--Order affirmed.

Not recommended for publication in the official reports.

OFFICE OF THE CLERK
SUPREME COURT
STATE OF WISCONSIN

Hon. Patrick T. Sheedy
Circuit Court of Milwaukee County
Br. 5, Milwaukee County Courthouse
Milwaukee, WI 53233

Madision February 7, 1984

James A. Gramling, Jr.
Legal Action of Wisconsin, Inc.
TO 230 W. Wells, #800
Milwaukee, WI 53203

M.L. Eisenberg
M.L. Eisenberg & Associates
1131 W. State St.
Milwaukee, WI 53233

The Court today announced an order in your case as follows:

No. 82-2256 Schwalbe v. Eisenberg

The court having considered the defendant-appellant's (Sydney M. Eisenberg) petition fo review from the adverse decision of district I of the court of appeals filed October 25, 1983;

IT IS ORDERED, the petition for review is denied. No costs.

7th day of February AD 1984

/s/
Clerk of the Supreme Court
of the State of Wisconsin

Heffernan, C.J., did not participate.

Marilyn L. Graves
Clerk of Supreme Court.

Wisconsin Statutes Cited:

"779.43 Liens of keepers of hotels, livery stables, garages and pastures. (1) As used in this section. (a) 'Boarding house' includes a house or building where regular meals are generally furnished or served to three or more persons at a stipulated amount for definite periods of one month or less. (b) 'Lodging house' includes any house or building or part thereof where rooms or lodgings are generally rented to three or more persons received or lodged for hire, or any part there of is let in which to sleep at stipulated rentals for definite periods of one month or less, whether any or all such rooms or lodgings are let or used for light housekeeping or not, provided that so called duplex flats or apartment houses actually divided into residential units shall not be considered a lodging house.

(2) Every keeper of any inn, hotel, boarding house or lodging house shall have a lien upon and may retain the possession of all the baggage and other effects brought into the place by any guest, boarder or lodger, whether the baggage and effects are the property of or under the control of the guest, boarder or lodger, or the property of any other person liable for such board and lodging for the proper charges owing such for such board and lodging and other accomodation furnished to or for such guest, boarder or lodger, and for all moneys loaned, not exceeding fifty dollars, and for extras furnished at the written request signed by the guest, boarder or lodger, until such charges are paid, and any execution or attachment levied upon such baggage or effects shall be subject to such lien and the costs of satifying it. But the lien given by this section does not cover charges for malt, spirituous, ardent or intoxicating liquors not the papers of any soldier, sailor or marine that are derived from and evidence of military or naval service or adjusted compensation, compensation, pension, citation, medal or badge.

(3) Every keeper of a garage, livery or boarding stable, and every person pasturing or keeping any carriages, automobiles, harness or animals, and every person or corporation, municipal or private, owning

Wisconsin Statutes Cited:

any airport, hangar or aircraft service station and leasing hangar space for aircraft, shall have a lien thereon and may retain the possession thereof for the amount due for the keep, support, storage or repair and care thereof until paid. But no garage keeper shall exercise the lien upon any automobile unless there shall be posted in some conspicuous place in the garage a card, stating the charges for storing automobiles, easily readable at a distance of 15 feet."

"805.15 New Trials
(1)Motion. A party may move to set aside a verdict and for a new trial because of errors in the trial, or becuase the verdict is contrary to law or to the weight of evidence, or because of excessive or inadequate damages, or because of newly discovered evidence, or in the interest of justice. Orders granting a new trial on grounds other than in the interest of justice, need not include a finding that granting a new trial is also in the interest of justice.

(3) Newly-discovered evidence. A new trial shall be ordered on the grounds of newly-discovered evidence if the court finds that: (a) The evidence has come to the moving party's notice after trial; and (b) The moving party's failure to discover the evidence earlier did not arise from lack of diligence in seeking to discover it; and (c) The evidence is material and not cumulative; and (d) The new evidence would probably change the result."

"806.07 Relief from judgment or order
(1) On motion and upon such terms as are just, the court may relieve a party or legal representative from a judgment, order or stipulation for the following reasons: (a) Mistake, inadvertence, surprise, or excusable neglect; (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3); (c) Fraud, mispresentation, or other misconduct of an adverse party; (d) The judgment is void; (e) The judgment has been satis-

Wisconsin Statutes Cited:

fied, released or discharged; (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated; (g) It is no longer equitable that the judgment should have prospective application; or (h) Any other reasons justifying relief from the operation of the judgment.

(2) The motion shall be made within a reasonable time, and, if based on sub. (1)(a) or (c), not more than one year after the judgment was entered or the order or stipulation was made. A motion based on sub. (1)(b) shall be made within the time provided in s. 805.16. A motion under this section does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or procedding, or to set aside a judgment for fraud on the court."

"904.04 Character evidence not admisible to prove conduct; exceptions; other crimes.
(2) Other crimes, wrongs, or acts. Evidence of other crimes wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

"904.05 Methods of proving character
(2) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

"904.06 Habit; routine practice
(1) Admissibility. Except as provided in s. 972.11(2), evidence of the habit of a person or other routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Wisconsin Statutes Cited:

(2) Method of proof. Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."

"939.12 Crime defined. A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime."

OTHER AUTHORITIES CITED:

UCC § 9-503. Secured Party's Right to Take Possession After Default.
Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under Section 9-504.

U.S. CONSTITUTION AMENDMENT XIV:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.